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BEFORE THE
DEPARTMENT OF TRANSPORTATION

DOCKET NO. 47383

AVIATION SECURITY:
PASSENGER MANIFEST INFORMATION

COMMENTS OF
JAPAN AIRLINES COMPANY, LTD.

Laurence A. Short, Esquire
David H. **Coburn**, Esquire
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

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Japan Airlines Company, Ltd. ("**JAL**"), a foreign air carrier organized under the laws of Japan, hereby submits these comments in response to the Advance Notice of Proposed Rulemaking ("**ANPRM**") in this proceeding published in the January 31, 1991 Federal Register, 56 Fed. Reg. 3810.

I. BACKGROUND

This proceeding was instituted pursuant to the requirements of section 203(a) of the Aviation Security Improvement Act of 1990 ("**Security Act**"), Pub.L. No. 101-604 (Nov. 16, 1990), which added a new section 410 to the Federal Aviation Act of 1958, 49 U.S.C. App. § 1380. Section 410,

applicable by its plain terms only to U.S. air carriers, requires that the Secretary of Transportation shall, by March 16, 1991, require such carriers to provide a passenger manifest for any flight to appropriate representatives of the U.S. Department of State not later than one hour after any such carrier is notified of an aviation disaster involving one of its flights outside of the United States or, if the one hour requirement cannot be met, as expeditiously as possible and not more than three hours after notification of the **disaster**.^{1/} Section 410 requires that such manifests include each passenger's name, passport number (if a passport is required) and the name and telephone number of a contact person for each passenger.

In addition to imposing the described requirements on U.S. air carriers, section 203 of the Security Act also provided, in its paragraph (c), that the Secretary consider a requirement for foreign air carriers comparable to that imposed by section 203(a) on U.S. air carriers. The statute does not prescribe any time frame within which such consideration must be initiated or concluded. Therefore, the review of whether any such requirement should be imposed on foreign air carriers need not be completed by the March 16 deadline for the establishment of rules applicable to U.S. air carriers.

^{1/} The ANPRM indicates that the term "**aviation disaster**" is proposed to be defined to include "**an** occurrence associated with a U.S. air carrier's international **operations**" that involves a death or serious injury, hostage-taking, or substantial damage to the aircraft resulting from an accident or unlawful act directed at the aircraft or its passengers.

The ANPRM notes the section 203(c) provision requiring that consideration be given to a foreign air carrier requirement, but does not expressly state that such a requirement is to be given consideration at this time. The ANPRM does nonetheless expressly raise questions concerning the collection of data from foreign air carriers and it implies that foreign air carriers might be subject to information collection **requirements**.^{2/} Accordingly, JAL will address in these comments those considerations which it believes are critical to any data collection or manifest-preparation proposal with respect to foreign air carriers.

II. DISCUSSION

It merits observation in connection with any suggestion that foreign air carriers be made subject to the section 203(a) requirements that the drafters of the Security Act purposefully chose not to statutorily require that foreign air carriers be made subject to those requirements. The May 15, 1990 Report of the President's Commission on Aviation Security and Terrorism contains, at page 102, a recommendation that all carriers be

^{2/} For example, the ANPRM asks for comments on whether foreign airlines serving the U.S. should comply with additional information collection requirements, how such information will differ from customs data such airlines already collect, whether the Department should mandate how foreign carriers conduct any information collection and, if foreign air carriers are not subject to the rule, whether this would competitively impact on U.S. carriers. 56 Fed. Reg. 3812. The reference in the ANPRM to data collected for "**customs**" should, JAL assumes, more appropriately be a reference to data collected for the Immigration and Naturalization Service.

required to collect data and prepare manifests for the use of the Department of State in the event of an aviation **disaster**.^{3/} This recommendation was reflected in a bill, H.R. 5200, which was a predecessor of the Security Act. See H. Rep. No. 101-845, **101st** Cong., 2d Sess. 12, **29** (1990). That bill would have imposed the exact same requirements with respect to manifests on U.S. and foreign air carriers as the final version of the statute imposes only on U.S. air carriers. It also would have required the FAA Administrator to consider the feasibility of extending U.S. landing rights only to foreign air carriers that implemented such requirements.

Notably, however, prior to final passage of the Security Act, Congress altogether deleted these requirements with respect to foreign air carriers and provided only that the Secretary "**consider**" extension of the requirements to foreign air carriers. The drafters of the Security Act thus recognized that any imposition of passenger manifest requirements on foreign air carriers implicates special considerations.

In **JAL's** view, Congress was appropriately cautious because any such requirement would far exceed the proper reach of U.S. law. Extension of the section 203(a) requirements to JAL, for example, would require that it collect information in Japan, from passengers who are mostly non-U.S. citizens, for the use of

^{3/} This recommendation was developed in response to the fact that Pan American Airlines apparently did not timely provide a passenger manifest to the Department of State following the Lockerbie disaster.

the U.S. Department of **State**.^{4/} Japan, however, constitutionally guarantees the right of privacy and this right protects from mandatory disclosure precisely the type of personal information that JAL would have to collect under the section 203(a) requirements. Persons protected by that constitutional provision would therefore have the right to refuse any request that personal data -- such as the name of a contact person -- be collected from them. JAL could not legally force such disclosure. As a result, the extension of any data collection requirement to JAL would place it in the untenable position of being forced to choose between a U.S. requirement and the demands of its own sovereign.

The doctrine of comity -- long recognized in U.S. law -- was developed precisely to avoid the possibility of such conflicting demands. Under this doctrine, U.S. law accords due deference to the legitimate demands of foreign law, and yields where the application of U.S. law would undermine the significant interests of other nations. See Timberlane Lumber Co. v. Bank of North America N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976) (recognizing principles of comity in connection with the exercise of U.S. jurisdiction over foreign entities); Restatement Third of the Foreign Relations Law of the United States, § 403 (1987) (providing that a state may not exercise jurisdiction to

^{4/} For example, Department of Transportation statistics reveal that during the second quarter of 1990, 88% of the traffic carried by Japanese flag carriers between the U.S. and Japan consisted of non-U.S. citizens.

prescribe law with respect to a person or activity having connections with another state where the exercise of such jurisdiction is unreasonable and further providing that the likelihood of conflict with the other state's law be considered). The considerations favoring application of comity are substantial in the setting under review here: JAL is organized under the laws of another nation; its passenger mix is composed primarily of non-U.S. citizens; the data contemplated for collection is highly personal: mandatory collection of such data would conflict with the constitutional guarantees of privacy adopted by Japan; the data collection would be conducted entirely for the benefit of the U.S. Department of State and the data would be used only in the very rare situation of an aviation disaster. The combination of these circumstances -- which are not unique to JAL -- dictate that no requirements of the sort imposed on U.S. air carriers by section 203(a) should be imposed on foreign air carriers.^{5/}

Wholly apart from the issues of comity discussed above, it bears note that **JAL's** passengers would likely be very reluctant to provide personal information which might be turned over to the U.S. Department of State, and which also might be available to a range of other **persons**.^{6/} In effect, JAL would be

^{5/} Congress obviously weighed the balance differently for U.S. air carriers, which operate under substantially different circumstances.

^{6/} The **ANPRM** recognizes that privacy concerns are significant in the context of the section 203(a) requirements, noting that (continued...)

forced to serve as the agent of the U.S. government in collecting such personal information from its passengers, a situation which would probably result in substantial difficulties in achieving strict compliance with any data collection requirement.

Further, if any consideration is to be given to imposing requirements such as those embodied in section 203(a) on other than U.S. air carriers, such consideration should take place, if at all, within the context of appropriate bilateral negotiations between the U.S. and other nations or within the machinery provided by the International Civil Aviation Organization ("**ICAO**"). The Security Act recognizes the important role of bilateral and multilateral negotiations in addressing important issues of aircraft security in a manner which is consistent with the international nature of commercial aviation.^{2/} The issues raised by any proposed extension of the section 203(a) requirements to foreign air carriers are no less an appropriate matter for such discussions.

Moreover, any data collection requirement carries with it the potential to result in serious implementation problems for foreign air carriers. For example, travel agents will likely not

^{6/} (. . .continued)

"**many** different people will have access to passenger manifest information including, of course, employees of airlines and travel agencies who will be collecting it. This raises questions of privacy protection." 56 Fed. Reg. 3811.

^{2/} See section 2 of the Security Act, 25 U.S.C. § 5501 note, setting forth Congressional findings that the U.S. should work through ICAO and directly with foreign governments to address security issues pertinent to foreign air carriers and to upgrade international aviation security objectives.

wish information revealing the names of their clients placed in a CRS system accessible to their competitors. To the extent compliance by agents is poor, carrier gate agents, already burdened by numerous tasks, would be forced to collect the data. Check-in times would be further prolonged and airport congestion increased.

CONCLUSION

JAL recognizes both its responsibility to victims of aviation disasters and its responsibility to adhere to appropriate reporting requirements with respect to its U.S. operations. These obligations are not at issue here.

However, any proposal to require collection by foreign air carriers of the type of data described in section 203(a) would constitute an improper intrusion by the U.S. into the laws of other nations and would exceed the legitimate bounds of obligations imposed by the U.S. on such carriers. For all of these reasons, JAL urges that the section 203(a) requirements not be applied to foreign air carriers.

Respectfully submitted,

Laurence A. Short DHK

Laurence A. Short
David H. Coburn
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Japan Airlines
Company, Ltd.

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